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6
7 UNITED STATES BANKRUPTCY COURT
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9
10 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION
11

12 In re

13 Case No.09-59673-MM

14 LOIS CHRISTINE JOHANSSON,

15 Chapter 7

16 Debtor(s).

17 R.S. No. KLJ-767

18 MOTION FOR RELIEF FROM
19 AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

20 DATE: January 6, 2010

21 TIME: 2:00am

22 CTRM: 3070

23 280 S 1st St. #268
24 San Jose, CA 95113-3004

25 Wells Fargo Bank, N.A. ("Movant"), moves this court for an order terminating the
26 automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all
27 acts necessary to enforce its security interest in real property generally described as 19700 N
28 76th Street 2037, Scottsdale, Arizona 85255.

29 On or about November 5, 2009, Lois Christine Johansson ("Debtor") filed a voluntary
30 petition under Chapter 7 of the Bankruptcy Code, and Carol Wu was appointed as Chapter 7
31 Trustee. As a result of said filing, certain acts and proceedings against Debtor and the
32 bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

33 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
34 362(d)(2).

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).

NO EQUITY

11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the debtor does not have any equity in the property and the property is not necessary to the debtor's effective reorganization.

In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that: § 362(d)(2) reflects congressional intent to allow creditors to immediately proceed against the property where the debtor has no equity and it is unnecessary to the reorganization, even where the debtor can provide adequate protection under § 362(d)(1). (Emphasis added).

Id. at 610 (emphasis added).

In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984).

An appropriate cost of sale factor should also be added to determine if the debtor has any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982).

On or about September 24, 2007, Lois Christine Johansson ("Debtor"), for valuable consideration, made, executed and delivered to Wells Fargo Bank, N.A. ("Lender") a Note in the principal sum of \$304,000.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal and interest payments commencing November 1, 2007, and continuing until October 1, 2037, when all outstanding amounts are due and payable. The Note provides that, in the event of default, the holder of the Note has the option of declaring all unpaid sums immediately due and payable. A true and correct copy of the Note is attached to the Declaration

1 in Support of Motion for Relief From Automatic Stay as exhibit A and incorporated herein by
2 reference.

3 On or about September 24, 2007, the Debtor made, executed and delivered to Lender a
4 Deed of Trust (the "Deed of Trust") granting Lender a security interest in real property
5 commonly described as 19700 N 76th Street 2037, Scottsdale, Arizona 85255 (the "Real
6 Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that
7 attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in
8 the outstanding balance under the Note. The Deed of Trust was recorded on September 28,
9 2007, in the Official Records of Maricopa County, State of Arizona. A true and correct copy of
10 the Deed of Trust is attached to the Declaration in Support of Motion for Relief From
11 Automatic Stay as exhibit B and incorporated herein by reference.

12 Movant currently owns the Note and is entitled to enforce the provisions of the Note and
13 Deed of Trust.

14 The obligation under the Note is in default as of May 1, 2009, for failure to make
15 payments to Movant. As of November 25, 2009, the total obligation due and owing under the
16 Note is in the approximate amount of \$313,453.69, representing the principal balance of
17 \$298,571.57, interest in the sum of \$12,112.43, late charges in the amount of \$561.54, and a
18 recoverable balance in the amount of \$2,208.15. This is an approximate amount for purposes of
19 this Motion only, and should not be relied upon as such to pay off the subject loan as interest
20 and additional advances may come due subsequent to the filing of the Motion. An exact payoff
21 amount can be obtained by contacting Movant's counsel. Further, Movant has incurred
22 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the
23 total arrears under the Note are in the approximate sum of \$15,629.37, excluding the post-
24 petition attorneys' fees and costs incurred in filing the instant Motion. A true and correct copy
25 of the contractual payment accounting pursuant to Local Rule 4001-1(g)(1) is attached to the
26 Declaration in Support of Motion for Relief From Automatic Stay as exhibit C and incorporated
27 herein by reference.

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II.

RELIEF FROM STAY

LACK OF EQUITY

Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and Statements, the fair market value of the Property is \$225,000.00. True and correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit D and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

10	Fair Market Value:	\$225,000.00
11	Less:	
12	Movant's Trust Deed	\$313,453.69
13	Bank of America's 2 nd Mortgage	\$89,000.00
14	Maricopa County Treasurer's Property Taxes	\$3,224.51
	Grayhawk HOA	\$1,727.44
	Grayhawk Community Assn.	\$472.00
	Costs of Sale (8%)	\$18,000.00
	Equity in the Property:	<\$200,877.64>

15 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
16 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
17 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

18 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
19 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's
20 Statement of Intent is attached to the Declaration in Support of Motion for Relief From
21 Automatic Stay as exhibit E and incorporated herein by reference.

III.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

CAUSE - LACK OF ADEQUATE PROTECTION

26 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to
27 adequate protection of its interest in the Property.

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1 Movant submits that adequate protection in this case requires normal and periodic cash
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
3 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtor is presently unwilling or unable to provide
5 adequate protection to the Movant and there is no probability that adequate protection can be
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
8 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
11 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
12 Trust;

13 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

14 3. Granting Movant leave to foreclose on the Real Property and to enforce the
15 security interest under the Note and the Deed of Trust, including any action necessary to obtain
16 possession of the Property;

17 4. Permitting Movant to offer and provide Debtor with information re: a potential
18 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan
19 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

20 5. Alternatively, in the event this court declines to grant Movant the relief requested
21 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
22 reinstate and maintain in a current condition all obligations due under the Note and Deed of
23 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations
24 to pay when due (a) the monthly installments of principal and interest, as required under the
25 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor
26 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
27 incurred in the filing of this motion;

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6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law; and

7. For such other and further relief as the court deems just and proper.

Dated: December 15, 2009

PITE DUNCAN, LLP

/s/ KATHERINE JOHNSON (CA SBN 259854)
Attorneys for WELLS FARGO BANK, N.A.